CHUNG SYN KHENG ELECTRICAL CO. BHD. v. REGIONAL CONSTRUCTION SDN. BHD.

[O.C.J. (Roberts C.J.) October 2 & 11, 1986]

[Bandar Seri Begawan – Suit No. 455 of 1985]

Contract Law – Main contract – Subcontract – Claim by subcontractor – Delay by subcontractor – Claim by subcontractor for liquidated damages under subcontract – Indemnity clause – Amounts payable – Interest – Costs.

The plaintiff ("CSK") was the nominated subcontractor for the execution of electrical works under the main contract dated December 20, 1984 executed between the defendant ("Regional") and Schlumberger Overseas S.A. ("the Employer"). By a subcontract dated January 7, 1985 made between CSK and Regional, CSK undertook to carry out the works on terms and conditions stated therein. CSK claimed the balance sum of $175,620.00 as due and unpaid from Regional the defendant, which admitted this amount but pleaded a set off and counterclaim against CSK in the total sum of $266,354.22. During the carrying out of the subcontract, CSK was seriously behind in its works programme and one of the main reasons for this was the failure of CSK to obtain some of the necessary electrical equipment.

It was agreed that there had been a delay of 21 days in the completion of the contract owing to the default of CSK and Regional relied on the terms of the subcontract and claimed $2,000.00 per day for 21 days, *i.e.* $42,000.00. CSK relied on section 75 of the Contract Act. Regional also claimed liquidated damages under clause 2(b) in the subcontract, alleging that Regional would eventually be liable to the Employer at the rate of $5,000.00 a day for 21 days in accordance with the terms of the main contract. The question for decision is whether the form of indemnity provided for in clause 2 of the subcontract can properly be said to impose upon the subcontractor an additional liability to the maximum of $2,000.00 a day liquidated damages provided under the subcontract.

Held: (1) the plaintiff is entitled to judgment for $175,620.00 plus interest at the rate of 6% on $33,510.00 from August 13, 1985, and on $142,110.00 from September 1985 in each case until payment;

(2) the defendant is entitled to recover under its set off and counterclaim amounts of $42,000.00, $104,533.08 and $12,842.76, totalling $159,375.84, interest on which will run until the date of payment at the rate of 6%:

(a) on $42,000 from September 18, 1985;

(b) on $104,533.08 from August 24, 1985;

(c) on $12,842.76 from September 18, 1985;

(3) the plaintiff will have costs up to February 27, 1986, and the defendant will have all costs thereafter.

Cases referred to:-

(1) *Linggi Plantations Ltd.* v. *Jagatheesan* [1972] 1 M.L.J. 89 (P.C.)
(2) *Wearne Brothers (M) Ltd.* v. *Jackson* [1966] 2 M.L.J. 155.
(3) *Bhai Panna Singh* v. *Bhai Arjun Singh* A.I.R. [1929] P.C. 179.

A CIVIL SUIT.

S.P. Wong for the plaintiff.
L.L. Beh for the defendant.

Cur. Adv. Vult.

Preliminary –

Roberts C.J.: By an agreement in writing dated December 20, 1984 ("the main contract"), between Schlumberger Overseas S.A. ("the Employer) and Regional Construction Sdn. Bhd. ("Regional"), Regional agreed to carry out the works described in the main contract.

The plaintiff, Chung Syn Kheng Electrical Co. Bhd. ("CSK"), was the nominated subcontractor for the carrying out of electrical works under the main contract. By an agreement in writing dated January 7, 1985 ("the subcontract"), made between Regional and CSK, CSK agreed to carry out various electrical and lighting works on the terms and conditions appearing in the subcontract.

The claim

By valuations No. 8 and 9 issued on August 13, 1985 and September 18, 1985, the Employer's architect certified the total sums amounting to $1,202,000/= were due to Regional from the Employer. The Employer's Quantity Surveyor further certified that there was due to CSK from Regional gross sums of $103,900/= under valuation No. 8 and about $157,900/= under valuation No. 9.

Regional received payment from the Employer under the two certificates, but failed to pay to CSK in full the amounts due to it under those certificates.

From the gross sum of $261,800/= there must be deducted retention money of 10%, thus leaving net sums due to the plaintiff of $93,510/= and $142,110, a total of $235,620/=. Of this, $60,000/= was paid by the defendant to the plaintiff on August 29, 1985, leaving a balance of $175,620/= due and unpaid.

This amount was the subject of the plaintiff's claim. The defendant in the first paragraph of its defence, admitted that this amount is due, but pleads a set off and counterclaim against the plaintiff.

Therefore, the plaintiff is entitled to judgment

for $175,620/= plus interest, at the rate of 6% on $33,510/= from August 13, 1985, and on $142,110/= from the September 18, 1985, in each case until payment.

Set off and counterclaim

By way of set off and counterclaim, Regional claims under four heads, which are summarized in paragraph 9 of the defence, set off and counterclaim as follows:

1.	To liquidated damages imposed on the Defendant by the employer as per paragraph 5	$105,000.00
2.	To sum advanced by way of Letter of Credit and other related expenditure as per paragraph 6	106,511.46
3.	To liquidated damages payable by the Plaintiff to the Defendant as per paragraph 7	42,000.00
4.	To additional cost and expenses to the Defendant for 21 days resulting from the delays by the Plaintiff as per paragraph 8	12,842.76
	Total :	$266,354.22

Sums advanced by way of letter of credit (paragraph 6)

During the carrying out of the subcontract, it became apparent to the architect that CSK was seriously behind in its works programme and that one of the main reasons for this was the failure of CSK to obtain some of the necessary electrical equipment.

The architect, therefore, suggested to Regional that the latter should consider ordering some of this equipment itself. This Regional did, having informed CSK that it intended to do so and obtained its agreement, opening Letters of Credit with the suppliers of the equipment for this purpose.

I am satisfied that this expense was reasonably incurred by Regional, as a result of delays by CSK in its performance under the subcontract and that these charges, if established, are properly due to it.

During the hearing, Regional was not able to produce any supporting evidence in relation to the sum claimed for interest on trust receipts of $1,978.38. However, the other items within this claim were established and Mr. Wong, for the plaintiff, rightly conceded that a sum of $104,533.08 had been shown to be due and that CSK no longer disputed this.

Liquidated Damages payable under the subcontract (paragraphs 7 and 8)

The subcontract provided for $2,000/= per day to be payable by way of liquidated damages in the event of delay by CSK in carrying out its subcontract with Regional.

It was conceded by Mr. Wong, and agreed by counsel for Regional, that there had been a delay of 21 days in the completion of the contract due to the default of CSK and that any award which might be proper should be based on that agreed period.

Regional relied on the terms of the subcontract and claimed $2,000/= per day for 21 days – *i.e.* $42,000/=.

However, the plaintiff relies upon the provisions of section 75 of the Contract Act which reads as follows:

> "When a contract has been broken, if the sum is named in the contract is the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amounts so named or, as the case may be, the penalty stipulated for."

On this issue, I was referred to a number of cases, among them, *Linggi Plantations Ltd.* v. *Jagatheesan*[1], *Wearne Brothers (M) Ltd.* v. *Jackson*[2] and *Bhai Panna Singh* v. *Bhai Arjun Singh.*[3]

The effect of these cases seems to be as follows:

(a) The distinction in English Law between liquidated damages and penalties disappears;

(b) All clauses for the payment of liquidated damages are to be treated as if they had been penalties under the former English Law;

(c) This means that the amount provided for liquidated damages will only be enforced in favour of the plaintiff if it can be shown that this amount was a genuine pre-estimate of the damage likely to flow from the specified breach;

(d) The amount of loss or damage which has actually occurred must be a major factor in deciding whether the amount provided for liquidated damages was an honest pre-estimate of the likely loss or damage;

(e) If the actual loss or damage suffered is very much less than the sum agreed, the Court will refuse to enforce the agreement to pay a specified sum by way of liquidated damages.

In this instance, the defendant also claims, by way of particularised loss under paragraph 8, an amount of $611.56 per day, based on the additional costs, which the defendant suffered, in having to maintain the site and works and other facilities connected with the carrying out of the contract, for a further 21 days.

The calculations, on which this figure of $611.56 per day was based, were not challenged by the plaintiff and I see no reason not to accept them as accurate. However, the defendant did not allege that it had suffered any damage other than these amounts (disregarding for the moment the question of liquidated damages under paragraph 5).

This amount of $611.56 is so much less than the figure of $2,000/= per day claimed as liquidated damages that I must find that the larger sum was not a genuine pre-estimate of the likely loss to Regional of CSK's delay.

Therefore, it is this lesser sum which represents the liquidated damages which can be recovered from CSK under the subcontract. In other words, the claims under paragraphs 7 and 8 seek to recover liquidated damages twice, once as a proved loss and once as a set daily amount.

I must, therefore, dismiss the claim under paragraph 7 for $42,000/= by way of liquidated damages and allow that under paragraph 8 for the $12,842.76, representing the actual loss or damage incurred by the defendant, as a result of the plaintiff's delays.

Liquidated damages payable by Regional

This part of Regional's claim is based on the following clause 2(b) in the subcontract –

"The Sub-Contractor shall –

(b)indemnify and save harmless the Contractor against and from –

(i) any breach, observance or non-performance by the Sub-Contractor, his servants or agents of the said provisions of the Main Contract or any of them;

(ii) any act or omission of the Sub-Contractor, his servants or agents which involves the Contractor in any liability to Employer under the main contract."

As a result of the delay of CSK in completing the subcontract, the Employer imposed liquidated damages on the defendant, for a period of 21 days, at the rate of $5,000/= a day, in accordance with the terms of the main contract.

In evidence, it emerged that the daily estimate of liquidated damages was set at $2,000/= per day, a figure which was altered at the time of the signature of the main contract to counterbalance a bonus of $40,000/= offered to the contractor, if the main contract was completed a month earlier than the specified date.

The amended figure of liquidated damages in the main contract predated the signature of the subcontract by the plaintiff. By paragraph 1 of the subcontract, the subcontractor was deemed to have notice of all the provisions of the main contract, and, therefore, must be presumed to have known that the figure of liquidated damages under the main contract was $5,000/= per day.

The question which I have to decide is whether the form of indemnity provided for in Clause 2 of the subcontract can properly be said to impose upon the subcontractor an additional liability to the maximum of $2,000/= a day liquidated damages provided under the subcontract.

I consider that this must have been the intention of the clause. If the subcontractor's liability were to be confined to liquidated damages for delay, Clause 2 would be pointless. Nor do I see anything wrong in law, though it may sometimes bear harshly in practice on a subcontractor, in his acceptance, under the subcontract, of an obligation to indemnify the contractor against claims made against the latter, where these are the result of an act or omission of the subcontractor.

In this instance, the acts or omissions of CSK led to an admitted delay of 21 days in the completion both of the subcontract and of the main contract. It was, therefore, those acts or omissions which involved the contractor in a liability of $5,000/- per day to the Employer under the main contract.

An agreement to indemnify is an undertaking by which one party promises to make good a loss suffered by the other in specified circumstances. I find that Clause 2 is such an agreement, and that the circumstances have arisen in which the promisor (CSK) is obliged to make good the loss suffered by Regional, namely the imposition by the Employer on Regional of liquidated damages.

It is not disputed that these amounts have been paid by Regional, by virtue of deductions made by the Employer from monies due to Regional.

What is not admitted, however, is that these were reasonable deductions, the plaintiff arguing that the amount of $5,000/= per day could not have been a reasonable pre-estimate of liquidated damages because –

(a) it was increased from $2,000/= only on signature of the main contract and for reasons which had nothing to do with the expected loss to the Employer of delay in the main contract.

(b) the evidence of Mr. Duncan, the architect (whom I found to be a most impressive witness), was to the effect that liquidated damages under the main contract would be based on renting the building. He added that $2,000/= a day would be a reasonable amount for this but that $5,000/= would not.

The question remains as to whether Regional can properly recover the full amount which was deducted from their payments by the Employer, or only such lesser amount as can be shown to have been a reasonable deduction by the Employer.

I do not think that Clause 2 can be construed as an open-ended indemnity, obliging the subcontractor to indemnify the contractor against whatever payments it makes to the Employer. I think that the indemnity must be continued as covering only such payments as the contractor shows to have been clearly established as due.

In this instance, there is sufficient evidence available to satisfy me that the Employer would not have been able to establish more than $2,000/= as due to it from Regional by way of liquidated damages, for the reasons referred to above.

I, therefore, conclude that Regional is entitled to recover under paragraph 4, only $2,000/= a day, under the indemnity clause – a total of $42,000/=.

Summary

In the result, I find the defendant is entitled to recover under its set off and counterclaim, amounts of $42,000/=, $104,533.08 and $12,842.76 – a total of $159,375.84.

Interest on this sum will run until the date of payment at the rate of 6% –

(a) on $42,000/= from September 18, 1985;

(b) on $104,533.08 from August 24, 1985;

(c) on $12,842.76 from September 18, 1985.

The plaintiff will have costs up to February 27, 1986, the date on which the defendant admitted the claim. The defendant will have all costs thereafter.

Costs to be agreed; and taxed if not agreed.

Order accordingly.

Solicitors: *Choo Chan & Wong; Susanna Lim & Co.*